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Supreme Court, U.S.
FILED
JAN 23 1998
CLERK

No. 97-454
In the Supreme Court of the United States
October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CPC INTERNATIONAL, INC., et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE

This case involves actions by the Petitioner, the United States, on behalf of the Environmental Protection Agency ("EPA") and by the Michigan Department of Environmental Quality ("MDEQ")[1] to recover environmental response costs for cleanup at one of the most severely contaminated sites in the country. MDEQ supports the position of the United States on the question presented: whether a parent corporation can be held directly liable under section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(2). For reasons unrelated to the question presented in the case at hand, MDEQ seeks reversal of the United States Court of Appeals for the Sixth Circuit's decision only as it pertains to the liability of CPC International, Inc. ("CPC"). Of relevance here, MDEQ and EPA sought to recover their costs from CPC, a parent corporation that actively participated in the operation of a chemical manufacturing facility owned by its subsidiary, located near Muskegon, Michigan, at the time hazardous substances were improperly disposed of at the site. The operative facts relevant to CPC's conduct are not in dispute. What is at issue is whether these facts support a finding of liability under the proper legal standards.

Ott Chemical Company ("Ott I") operated a chemical manufacturing facility on the site from 1959 to 1965. From 1965 to 1972 the site was owned and operated by a wholly-owned subsidiary of CPC, known as the Ott Chemical Company ("Ott II"). In 1972 Ott II/CPC sold the facility to Story Chemical Company. CPC's liability arises from its operation at the site from 1965 to 1972. Extensive contamination occurred during this time period.

During the Ott I and Ott II eras, chemical wastes were disposed of in unlined lagoons and hundreds of drums containing hazardous wastes were buried in a sandy pit. Hundreds of gallons of chemicals were spilled from train cars onto railroad tracks, hazardous substances were dumped in

[1] On August 1, 1995, Governor John Engler issued Executive Order No. 1995-18, creating the Michigan Department of Environmental Quality (MDEQ) and transferring specified powers, authorities and duties from the former Michigan Department of Natural Resources, the named party in the courts below, to the MDEQ.

the woods, and there were frequent overflows of chemical wastes at a cement lined equalization basin. *CPC Int'l, Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 556 (W.D. Mich. 1991); App. 60-61a. As a result of these disposal practices, the soil, surface water, and groundwater at the site became contaminated with a variety of hazardous substances.

This case was filed in the U.S. District Court for the Western District of Michigan pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. CPC initiated this litigation by filing claims against MDEQ, Aerojet General Corporation ("Aerojet") and its subsidiaries, Cordova Chemical Company of California and Cordova Chemical Company of Michigan (the "Aerojet entities"), for contribution under CERCLA. *CPC Int'l, Inc. v. Aerojet General Corp., et. al.* (District Court Case No. 89-10503). MDEQ filed a counterclaim against CPC and a cross claim against Aerojet and its subsidiaries for cost recovery and contribution. The Aerojet entities also filed counterclaims against CPC and cross claims against MDEQ. The United States, on behalf of the EPA, filed a separate action asserting CERCLA cost recovery claims against CPC, the Aerojet entities and Arnold Ott. *United States v. Cordova Chemical Co., et. al.* (District Court Case No. 89-0961). The two actions were consolidated for discovery, trial and appeal.

After a fifteen-day bench trial, in which twenty-nine witnesses presented live testimony and more than 2,300 exhibits were admitted into evidence, the district court made extensive factual findings. *CPC Int'l, Inc.*, 777 F. Supp. at 555-70; App. 58-100a. CPC did not challenge the factual determinations of the district court, nor did the Court of Appeals find any of the factual findings to be clearly erroneous.

The district court made comprehensive and detailed findings of fact on which it based its legal conclusion that CPC was an operator of the facility in question, the former chemical manufacturing plant and associated property located in Dalton Township, Michigan. CPC directed operations at the facility. "CPC officials exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id*. at 559; App. 71a. CPC's control and decision-making authority were evidenced in all aspects of Ott II affairs, including environmental, financial aspects and labor negotiations. *Id*. at 562; App. 74-77a. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II. *Id*.; App. 77a.

In particular, CPC's control of Ott II's environmental affairs was so pervasive that Ott II could not make a decision or even fill out a governmental questionnaire without the approval of CPC management. CPC's governmental and environmental affairs director, G.R.D. Williams, coordinated all pollution activities for CPC and its divisions and subsidiaries, including Ott II. Mr. Williams became actively involved in environmental affairs at Ott II, including participating in negotiations with state regulators on waste disposal issues, suggesting stall tactics in dealing with state regulators, and directing Ott II on how to respond to inquiries from state and federal regulators. He actively participated in and exerted control over Ott II environmental matters. *Id*. at 561; App. 74-76a.

It is clear from the district court's findings of fact, that the court did not base its decision solely on the fact that CPC controlled the Ott II Board of Directors. The decision was also based on the policies and actions of individual CPC officials. Based upon the factual findings, the district court held CPC directly liable as an operator of the facility at the time of disposal under section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2):

> Liability attaches here because the evidence shows active participation and control by CPC in Ott II affairs both internally through the subsidiary's board and management and externally through the policies of the development company and the actions of individual CPC officials. *The evidence shows a level of participation and control by CPC that exceeds the*

> *bounds of an interested investor and enters the realm of an active operator.* When a parent corporation permeates the board, management and decision-making of a wholly owned subsidiary that was disposing of hazardous waste, operator liability directly attaches under CERCLA.

Id. at 575; App. 111-112a (emphasis added).

On appeal, a divided panel of the Court of Appeals reversed the district court's determination that CPC is liable as an operator. *United States v. Cordova Chemical Co.*, 59 F.3d 584, 590 (6th Cir. 1995); App. 130a, *vacated*, 67 F.3d 586 (6th Cir. 1995); App. 171a. The panel majority concluded that, as a matter of law, "a parent corporation incurs operator liability pursuant to subsection 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met." *Id.* at 590; App. 143a.

Judge Ryan, dissenting, concluded that a parent corporation, like any other "person" as defined in CERCLA, could be held liable as an operator under section 107(a)(2) and the question as to whether CPC was an operator of the facility is simply a question of fact; *i.e.*, whether the parent corporation was an operator-in-fact of the facility. *Id.* at 594; App. at 152-153a.

Petitions by the United States and the MDEQ for rehearing *en banc* were granted and the panel decision was vacated. *United States v. Cordova Chemical Co.*, 67 F.3d 586 (6th Cir. 1995); App. 171a. An *en banc* Opinion was issued on May 13, 1997. *United States v. Cordova Chemical Co.*, 113 F.3d 572 (6th Cir. 1997); App. 1a. In a divided decision, the seven member *en banc* majority held that a parent corporation will be liable only when the requirements to pierce the corporate veil under state law are met.

The dissenting opinion of Judge Ryan, in which four other judges joined, would have affirmed the district court decision finding CPC liable. It emphasized that the district court's findings concerning CPC's pervasive control of Ott II's

activities at the facility were not found clearly erroneous, and based upon the findings of actual control, CPC was directly liable as an operator under section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

Respondent, MDEQ, filed a Petition for Writ of Certiorari on August 8, 1997, *Michigan Department of Environmental Quality v. CPC, International, Inc.*, Supreme Court No. 97-296, seeking review of the issue as to whether a parent corporation can be held directly liable under section 107(a)(2) of CERCLA. Petitioner, United States, filed a Petition for Writ Of Certiorari on September 10, 1997 seeking review of the same legal issue. The United States' Petition was granted on December 12, 1997.

SUMMARY OF THE ARGUMENT

1.) The Court of Appeals decision, finding that a parent corporation can only be held liable as an operator under CERCLA by piercing the corporate veil, is inconsistent with the plain language of CERCLA. Under CERCLA's statutory scheme, any person who operates a facility at the time of disposal of hazardous substances, is strictly liable as an operator. This includes a parent corporation that exerts control over its subsidiary to the extent that the parent corporation is the actual operator of the facility. The definition of "person" under CERCLA is broad and includes parent corporations. In the case at hand, CPC operated the facility at the time hazardous wastes were disposed. Corporate veil piercing under state law is not relevant to the issue of whether a parent corporation can be held directly liable as an operator under CERCLA.

2.) The Court of Appeals decision is in direct conflict with decisions in the First, Second, Third, and Eleventh Circuits. *See: Certain Underwriters at Lloyds, London v. St. Joe Minerals Corp.*, 90 F.3d 671 (2d Cir. 1996); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), and *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991). In

all of the above-cited cases the courts have held that a parent corporation may be held directly liable as an operator without piercing the corporate veil.

ARGUMENT

I

THE PLAIN LANGUAGE OF CERCLA PROVIDES THAT A PARENT CORPORATION IS DIRECTLY LIABLE AS AN OPERATOR WHERE IT HAS ACTIVELY PARTICIPATED IN, AND EXERCISED CONTROL OVER, THE SUBSIDIARY'S BUSINESS, REGARDLESS WHETHER ITS CONDUCT IS SUFFICIENT UNDER STATE LAW TO PIERCE THE CORPORATE VEIL.

The Court of Appeals' decision, holding that a parent corporation can only be held liable as an operator under CERCLA when the standards for piercing the corporate veil are met under state law, is not supported by the plain language of section 107(a) of CERCLA. This case involves a simple matter of federal statutory construction and state common law veil piercing standards do not apply.[2]

In order to establish liability under CERCLA one must prove that: 1) a release of a hazardous substance has occurred, 2) at a facility, 3) causing a plaintiff to incur response costs, 4) and the defendant is a responsible party as defined under section 107(a) of CERCLA, 42 U.S.C. § 9607(a). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *United States v. Aceto Agricultural Chemical Corp.*, 872 F.2d 1373 (8th Cir. 1989). The parties have stipulated to the first three elements set forth above. The issue in the case at hand involves the interpretation of the fourth

[2] Although it is MDEQ's position that veil piercing analysis is not relevant to the question of operator liability under CERCLA, it should be noted that the Court of Appeals majority applied the wrong standard for piercing the corporate veil under Michigan law. The district court opinion and Judge Ryan's dissenting opinion sets forth the correct standard under Michigan law. *See CPC Int'l Inc.*, 777 F. Supp. at 574, 578-579, App. 108-110a, 120a-121a; *Cordova Chemical Co.*, 113 F.3d at 591-593, App. 45-47a.

element, or whether CPC is a responsible party under 42 U.S.C. § 9607(a). Section 107(a) reads, in part, as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --
>
> * * *
>
> (2) *any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,*
>
> * * *
>
> *. . . shall be liable for*
>
> *(A) all costs of removal or remedial action incurred by the United States Government or a State . . . .*

42 U.S.C. § 9607(a) (emphasis added).

The term "owner or operator" is defined by section 101(20)(A)(ii) of CERCLA, 42 U.S.C. § 9601(20)(A)(ii), as any person owning or operating such facility. The parties stipulated that CPC is a "person" for purposes of the statute. One court has found that the circularity of the definition "strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings". *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988). As the dissenting opinion in the case at hand noted, the definition of owner in 42 U.S.C. § 9601(20)(A)(iii) explicitly excludes one whose ownership interests is merely that of a stockholder who does not participate in the management of a facility, "suggesting that one who does participate in management is accordingly susceptible to liability". *Cordova Chemical Co.*, 113 F.3d at 587 (Judge Ryan, *dissenting*) (*citing Kayser-Roth Corp.*, 910 F.2d at 26, n. 6; App. 33a.

The definition of "owner or operator" indicates that Congress intended to impose liability on any entity actually operating a facility at the time of disposal of hazardous

substances. The form of the operator, be it a parent corporation, individual or other entity, is irrelevant. Numerous courts have imposed liability on the entity actually operating the facility, without regard to the entity's interest in the facility or its corporate form. *Certain Underwriters at Lloyds, London*, 90 F.3d 671 (parent corporation); *Schiavone*, 79 F.3d 248 (parent corporation); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (*en banc*) (federal government); *Lansford-Coaldale Joint Water Authority*, 4 F.3d 1209 (parent corporation); *Jacksonville Elec. Auth.*, 996 F.2d 1107 (parent corporation); *John S. Boyd Co.*, 992 F.2d 401 (parent corporation); *Kaiser Aluminum and Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992) (contractor/excavator); *Kayser-Roth Corp.*, 910 F.2d 24 (parent corporation); *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), *cert denied*, 117 S. Ct. 50 (1996) (parent corporation); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992), *cert. denied, 506 U.S. 940 (1992)* (tenant); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417 (7th Cir. 1994) (corporate officer); *U.S. v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), *cert. denied*, 516 U.S. 817 (1995) (employee).

The interpretation that a parent corporation can be held liable as an operator is also supported by the definition of "person":

> The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. § 9601(21). This definition clearly encompasses a parent corporation, and the parties have stipulated that CPC is a "person." *CPC Int'l, Inc.*, 777 F. Supp. at 556; App. 36a.

> "[P]erson" is defined broadly to include a firm, corporation, or commercial entity, among other things. CERCLA's language, therefore, indicates an intent to hold a corporation liable for the environmental violations of its subsidiaries

> and sister corporations, if it is otherwise determined to have operated the facility in question.

Lansford-Coaldale, 4 F.3d at 1221, n. 11. *Also see*: *Schiavone*, 79 F.3d at 255; *Kayser-Roth*, 910 F.2d at 26, n. 5.

The Court of Appeals majority found that nothing in the statute warrants disregard of the "time honored limited liability protections afforded by the corporate form", and adopted language from the Fifth Circuit: "[I]f Congress wanted to extend liability to parent corporations it could have done so and remains free to do so." *Cordova Chemical Co.*, 113 F.3d at 579-80; App. 14a; *citing Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991). Both the Court of Appeals decision in the case at hand and the Fifth Circuit's decision in *Joslyn Mfg. Co.* ignore the broad definition of "person" which clearly encompasses any corporation, including a parent corporation. The plain language of CERCLA supports the district court's decision that a parent corporation can be held directly liable as an operator under CERCLA.

The courts which have considered the liability of parent corporations have developed various approaches for determining whether a parent corporation is an operator of a facility. The district court followed the approach set forth in *Kayser-Roth*, 910 F.2d at 27:

> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

Factors to consider in assessing whether a parent corporation operated its subsidiary include the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal. In addition, determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful in determining whether the parent has operated a wholly owned subsidiary. Other evidence may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.

CPC Int'l, Inc., 777 F. Supp. at 573; App. 107-108a.

The standard set forth by the district court is in accordance with the majority of other courts that have considered the issue. *See: Kayser-Roth*, 910 F.2d at 27; *John S. Boyd*, 992 F.2d at 408; *Certain Underwriters*, 90 F.3d at 674; *Lansford-Coaldale*, 4 F.3d 1209; *Jacksonville Electric*, 996 F.2d 1107. This is a workable, fact specific inquiry which Respondent urges this Court to adopt.[3] This standard also promotes uniformity in the application of operator liability under CERCLA. Under the Court of Appeals' standard, liability of a parent corporation will vary from state to state

[3] Although most of the courts considering the issue have found that actual control and active involvement with the activities of its subsidiary is necessary to establish operator liability, other courts have held that the authority to control is sufficient for establishing operator liability. *See: Nurad*, 966 F.2d at 842; *Kaiser Aluminum*, 976 F.2d at 1344. *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 670-71 (D. Idaho 1986); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Penn. 1989); *Kelley v. Thomas Solvent*, 727 F. Supp. 1532 (W.D. Mich. 1989). In adopting this standard the *Nurad* court reasoned it "placed accountability in the hands of those capable of abating further environmental harm".

due to the fact that states have different common law standards for piercing the corporate veil.

At trial, MDEQ and EPA proved that CPC had the ability to control and did, in fact, control the facility. The district court found that contamination occurred during the time period Ott II/CPC operated the site:

> The principal source of contamination at the site was the use of engineered, unlined lagoons at the northwestern edge of the site for chemical waste disposal. From 1959 to at least 1968, during the Ott I and Ott II periods of ownership, wastewaters and other chemical waste used in the manufacturing process were discharged into the lagoons, where much of the contaminants seeped into the ground and water. No disposal into the lagoons occurred during the Story and Cordova periods.
>
> During the Ott I and Ott II era, chemical waste also entered the ground through the burial and slitting of hundreds of drums in a sandy pit; numerous spills of hundreds of gallons of chemicals from train cars onto railroad tracks; frequent overflows of chemical waste at a cement-lined equalization basin; and the dumping into the woods of buckets of hazardous chemicals that had spilled during the manufacturing process. Some spills of hazardous waste also occurred during the Story and Cordova periods of ownership.
>
> Contamination entering the ground from disposal in the lagoons or through spills then seeped into the ground and migrated away from the site via the aquifer to the southeast, ultimately reaching two waterways, Little Bear Creek and the Unnamed Tributary.

CPC Int'l, Inc., 777 F. Supp. at 556; App. 60-61a.

The district court also found that the environmental problems at the site were exacerbated by CPC's involvement at the site:

> Following (CPC's) acquisition, Ott II's production capacity significantly increased as CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons, which were expanded to accommodate the additional wastes.

CPC Int'l, Inc., 777 F. Supp. at 558; App. 67a.

During the Ott II era, CPC was directly involved in the operation at the facility. The district court made extensive findings of fact as to CPC's pervasive control of the site. *CPC Int'l, Inc.*, 777 F. Supp. at 557-562, 575; App. 61-77a, 110-112a. The district court found that CPC actively participated in and at times controlled the policy-making decisions of its subsidiary through its representation on the Ott II Board of Directors. CPC had majority control of the Ott II board for three years. CPC directors serving on the Ott II board reported back to CPC about Ott II programs and gave approval on behalf of CPC for appropriation requests. During CPC's entire period of ownership of Ott II, the chairman of the Ott II board was always a top-ranking CPC executive. CPC matters were discussed at board meetings, and Ott II board members recognized the need to consider CPC's interest and seek strong guidance from the parent company during these sessions. *Id.* at 558-59; App. 67-69a.

The district court's opinion was not based solely or even extensively on the fact that CPC controlled the Ott II Board of Directors. The district court found that CPC also actively participated in and exerted control over day-to-day decision making at Ott II. CPC actively participated in the decision making by placing high-ranking CPC officers in Ott II management positions. The president of Ott II reported directly to the president of CPC. *Id.* at 559; App. 70a. CPC officials played decisive roles in Ott II's policy-making structure. "CPC officials exerted significant control and bore

ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id.*; App. 71a.

More importantly, the district court also found that CPC's control was especially evident in the area of environmental matters. Numerous exhibits introduced at trial, including internal memoranda between Ott II and CPC, established CPC's control of environmental matters at the facility. See Trial Exhibits: 334, 336, 358, 397, 401, 424, 458, 476, 531, 576, 584, 596, 740, 760, 780, 789, and 799.[4] Ott II could not make an environmental decision or even fill out a governmental questionnaire without the review and approval of CPC management. See Trial Exhibits 746, 789 and 799. The district court found that CPC was directly and extensively involved with environmental matters at Ott II and that CPC actively participated and exerted control over environmental matters. *Id.* at 561; App. 74-76a

CPC also exerted significant control over Ott II's finances and participated in labor negotiations at Ott II. *Id.* at 562; App. 76-77a. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II. *Id.*; App. 76-77a.

Based upon these extensive factual findings the district court held that CPC was liable as an operator. The court found that CPC's active participation and control of Ott II went beyond the bounds of an interested investor and that CPC had permeated the board, management, and decision-making of Ott II. *Id.* at 575; App. 111-112a.

CPC did not challenge any of the district court's factual findings on appeal. The Court of Appeals' *en banc* majority did not find any of the district court's findings of fact clearly erroneous. Instead, the Court of Appeals created a new legal

[4] The exhibits were admitted into evidence as part of the Pretrial Order, District Court Docket Entry Nos. 333-334. See trial transcript at pp. 12-14. The following exhibits were also included in the Court of Appeals Appendix: 334 at page 2031, 336 at page 2034, 358 at page 2180, 397 at page 2189, 476 at page 2251, 531 at page 2260, 584 at page 2268, 780 at page 2312, 789 at page 2314, and 799 at page 2317.

standard that is not supported by the plain language of the statute.

II

THE COURT OF APPEALS DECISION DIRECTLY CONFLICTS WITH DECISIONS IN THE FIRST, SECOND, THIRD AND ELEVENTH CIRCUITS, WHICH HAVE ALL HELD THAT A PARENT CORPORATION CAN BE DIRECTLY LIABLE AS AN OPERATOR UNDER CERCLA.

The Court of Appeals interpretation of CERCLA is in direct conflict with four other Circuit Courts that have found parent corporations directly liable as operators under CERCLA when the parent corporation actively participated in, and exercised control over the activities of the subsidiary. *See: Certain Underwriters at Lloyds, London* (2d Cir.); *Schiavone* (2d Cir.); *Lansford-Coaldale Joint Water Authority* (3d Cir.); *Jacksonville Elec. Auth.* (11th Cir.); *John S. Boyd Co.* (1st Cir.); and *Kayser-Roth Corp.* (1st Cir.); *but see Joslyn Mfg. Co.* (5th Cir.).[5]

In contrast, the Court of Appeals found as follows:

> [W]e . . . hold that where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met. In other words, under the circumstances of this case, whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the

[5] In *Riverside Market Dev. v. Intern Bldg. Products*, 931 F.2d 327 (5th Cir. 1991), *cert. denied*, 502 U.S. 1004 (1991), the Fifth Circuit recognized that an individual corporate officer could be found liable as an operator under CERCLA, if the officer actively participated in the wrongful activities. The court noted that personal liability as an operator is distinct from liability imposed through piercing the corporate veil, indicating that the precedential value of the *Joslyn* decision is limited.

> abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.
>
> . . . Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.

Cordova Chemical Co., 113 F.3d at 580; App. 15a.

The conflict between the Court of Appeals and other circuits was expanded by the divided *en banc* decision in *Donahey v. Bogle*, 129 F.3d 838 (6th Cir. 1997). In *Donahey* the Court of Appeals applied the standard for operator liability set forth in *Cordova Chemical Co.* to an individual who was the 100% shareholder and manager of a corporation. The court held that in order to to find an individual shareholder liable as an operator the elements necessary to pierce the corporate veil must be established. The court appears to apply this standard without regard to the shareholder's involvement in the facility's operations. Thus, under *Donahey* an individual who is involved in day-to-day operations of a facility may not satisfy the Court of Appeals' criteria for establishing operator liability. This holding conflicts with the Fifth Circuit's decision in *Riverside Market Dev.*, the Second Circuit's decision in *New York v. Shore Reality Corp.*, 759 F.2d 1032 (2d Cir. 1985), and the Eighth Circuit's decisions in *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478 (8th Cir. 1992), and *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995).

Under the Court of Appeals decision, the standard for determining whether a parent corporation is liable as either an owner or operator would be the same: the facts must support

piercing the corporate veil.[6] This interpretation ignores the disjunctive character of CERCLA liability, holding both an "owner" and an operator liable. Owner liability and operator liability denote two separate and distinct concepts.

The *Schiavone* court explained the importance of the distinction:

> This distinction has particular relevance in the context of parent and subsidiary corporations where the theory of liability selected mandates different bases of proof. A finding of *owner* liability invokes the parent-subsidiary relationship and can be made only in circumstances that permit corporate veil piercing. *USX Corp.*, 68 F.3d at 823 ("[T]raditional principles of corporate law would not permit 'owner' liability to be extended to a corporate parent unless piercing the corporate veil were warranted."); *John S. Boyd Co.*, 992 F.2d at 408; *Lansford-Coaldale*, 4 F.3d at 1220; *Solvent Chem.*, 875 F. Supp. at 1019. Such *owner* liability is entirely distinct from parent *operator* liability, proof of which looks to the independent actions of the parent corporation, evidenced through its control over the polluting site. *John S. Boyd Co.*, 992 F.2d at 408; *Lansford-Coaldale*, 4 F.3d at 1220; *Solvent Chem.*, 875 F.Supp. 1019. As the Third Circuit has explained:
>
> > Under CERCLA, a corporation may be held liable as an owner for the actions of its subsidiary corporation in situations in which it is determined that piercing the corporate veil is warranted. . . . Operator liability, in contrast, is generally reserved for those situations in which a parent or sister corporation is deemed, due to the specifics of its relationship with its affiliated corporation, to have had substantive control over the facility in question. *Lansford-Coaldale*, 4 F.3d at 1220 (citation omitted).

[6] The majority opinion stated, in response to Judge Ryan's dissenting opinion, that a parent corporation could be held directly liable as an operator "where the parent corporation directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary". *Cordova Chemical Co.*, at 581, App. 17a. The court did not explain what it means by "directly operates the facility . . . as an actual co-operator along side the subsidiary". The court rejected the standard applied by the district court, and thus, has found that pervasive control and involvement in day-to-day operations of the facility is not enough to find that a parent corporation was an actual co-operator of a facility. This clearly conflicts with the generally accepted interpretation of what it means to be an operator under CERCLA. Other than establishing facts that support piercing the corporate veil, one cannot determine what proofs would be necessary, under the majority's interpretation, to establish that a parent corporation was an operator under CERCLA.

Schiavone, 79 F.3d at 254. *Also see*: *Sidney S. Arst. Co.*, 25 F.3d at 420; *Kayser-Roth*, 910 F.2d at 26; *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. 36-38a.

The Court of Appeals opinion is highly critical of the numerous courts that have relied on CERCLA's remedial goals as justification for interpreting the statute broadly because the legislative history of the statute is sparse. *Cordova Chemical Co.*, 113 F.3d at 577-78; App. 13-14a. The rule that remedial statutes should be liberally construed is firmly established. *Dennis v. Higgins*, 498 U.S. 439, 443; 111 S. Ct. 865, 868 (1991). Although the legislative history of CERCLA may be sparse on specific provisions, the remedial intent of the statute is clear from both the statute itself and its legislative history. *See*: *Anspec Co. Inc. v. Johnson Controls Inc.*, 922 F.2d 1240, 1241 (6th Cir. 1991); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989) *cert. denied*, 494 U.S. 1057; 110 S. Ct. 1527; *Kayser-Roth*, 910 F.2d at 26; *Deadham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Reality*, 759 F.2d 1032, 1045 (2d Cir. 1985); *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

The Court of Appeals concluded that CERCLA should be narrowly construed:

> Thus, while the liability provisions concerning facility operators should be construed so that the financial responsibility falls upon those entities that contributed to the environmental

> problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. . . .
>
> In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to those parties who are culpable in a sense that, they by some realistic measure, helped to create the harmful conditions.

Cordova Chemical Co., 113 F.2d at 578; App. 9-10a.

This proposed "tenet" ignores the text of the statute and the well established principle that liability under CERCLA is both strict and joint and several.[7] *FMC Corp.*, 29 F.3d at 835; *Kayser-Roth*, 910 F.2d at 26. Moreover, as pointed out in the dissenting opinion, the district court decision holding CPC directly liable as an operator does not, in fact, rest exclusively or even primarily on the so-called remedial legislation "litany" denigrated by the majority opinion. *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. 35a.

The Court of Appeals' two other main criticisms of the district court's decision regarding CPC's liability are equally untenable. First, the majority suggests that the district court improperly "replaces the relatively bright line provided by the traditional doctrine of piercing the corporate veil with a nebulous 'control' test." *Cordova Chemical Co.*, 113 F.3d at 580; App. 14a.[8] As discussed, *supra*, however, the actual control test of direct operator liability under CERCLA adopted by the district court and a majority of other Courts of Appeal is both workable and consistent with the statute. The majority

[7] In exonerating CPC from liability, the Court of Appeals ignored its own "tenet" that parties who "helped to create the harmful conditions" should be held liable. *Cordova Chemical Co.*, 113 F.2d at 578; App. 9-10. The district found that CPC did, in fact, control environmental matters at the site, including waste disposal. *CPC Int'l, Inc.*, 777 F. Supp. at 561-562; App. 74-76a. Thus, although it is not necessary to establish culpability under CERCLA, CPC was, in fact, culpable or responsible for the waste problems at the site.

[8] There is no bright line standard for piercing the corporate veil. This is evident by the fact that the Court of Appeals *en banc* panel applied three different standards for piercing the corporate veil. See *Cordova Chemical Co.*, 113 F.3d at 580; App 15-16a (majority opinion); *Id.* at 583-586; App 24-32a (Judge Merritt dissenting) and *Id.* at 590-591; App 45-50a (Judge Ryan dissenting).

opinion's suggestion that this standard is being used to "replace" the veil-piercing doctrine confuses the two alternative, independent bases of liability: direct statutory liability as an operator and common law vicarious liability as an owner through piercing the corporate veil. *Cordova Chemical Co.*, 113 F.3d at 588 (dissenting opinion); App. 36a.

It is clear that the district court did not replace traditional veil piercing with the actual control test. The district court applied the control test in determining whether, as the governments alleged, CPC and Aerojet were each directly liable as an operator under section 107(a)(2) of CERCLA. *CPC Int'l, Inc.*, 777 F. Supp. at 574-575, 579-580; App. 110-113a, 123-125a. As an entirely separate matter, the district court applied the test for piercing the corporate veil to determine if Aerojet, as also alleged by the governments, was vicariously liable as an "owner" of the facility, which was owned by its subsidiary. *CPC Int'l, Inc.*, 777 F. Supp. at 578-578; App. 119-122a.

Second, the majority expressed concern that "the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites". *Cordova Chemical Co.*, 113 F.3d at 580; App. 14a. That stated concern is misplaced. To begin with, operator liability under the actual control standard is not, in fact, "unlimited". Furthermore, any deterrent effect on the acquisition of contaminated property stems from section 107(a)(1) of CERCLA, which imposes strict liability on current owners and operators of contaminated sites, not from the construction of the term operator under section 107(a)(2) adopted by the district court. Any such deterrent effect would be felt by all prospective owners and operators, not just parent corporations and is entirely distinct from the issue of CPC's operator liability under section 107(a)(2).

The Court of Appeals' criticisms of the district court's decision are unfounded and its decision is against the great weight of authority as evidenced by conflicting decisions in the First, Second, Third and Eleventh Circuits. *See: Certain Underwriters at Lloyds, London* (2d Cir.); *Schiavone* (2d Cir.); *Lansford-Coaldale Joint Water Authority* (3d Cir.); *Jacksonville Elec. Auth.* (11th Cir.); *John S. Boyd Co.* (1st Cir.). As applied

in *Donahey*, the standard also conflicts with decisions in the Second, Fifth and Eighth Circuits.

The Court of Appeals' decision contravenes the intent and purpose of CERCLA. By failing to give the words "owner" and operator their plain meaning, the Court of Appeals has impermissibly created a new standard, the contours of which are both vague and ambiguous. The decision allows a parent corporation that actually operates a hazardous waste facility to hide behind the corporate form even when the evidence presented establishes a level of participation and control that exceeds the bounds of an interested investor and enters the realm of an active operator. Under CERCLA, the term operator clearly encompasses a parent corporation such as CPC, who actively participated in and controlled the activities of its wholly-owned subsidiary at the facility.

CONCLUSION

For these reasons, Respondent, MDEQ, requests this Court to hold that a parent corporation may be held directly liable under CERCLA when the parent corporation has actively participated in, and exercised control over the activities of its subsidiary. Respondent further requests that this Court reverse the Court of Appeals and hold CPC directly liable as an operator under CERCLA.

Respectfully submitted,

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January, 1998